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No. 15-8049

In the Supreme Court of the United States

DUANE EDWARD BUCK, PETITIONER

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Petitioner shot his stepsister at point-blank range, shot another man through the heart, executed his former girlfriend in the street outside her home while her children watched, and laughed about what he had done. A Texas jury sentenced petitioner to death, finding that he would be a future danger to society. At the penalty phase, petitioner's defense counsel relied on his own expert's report and testimony that linked petitioner's race to future dangerousness. Petitioner's expert nevertheless concluded, against the substantial weight of other evidence presented to the jury, that petitioner presented a low likelihood of future dangerousness. After procedurally defaulting his claim of ineffective assistance of trial counsel, petitioner eventually sought to raise that claim through his second Federal Rule of Civil Procedure 60(b)(6) motion to reopen the judgment denying his federal habeas petition. The motion was based on the State waiving any opposition to resentencing in other cases in which the same expert testified but the *prosecution* elicited the race-as-dangerousness testimony.

The question presented is whether, in light of the overwhelming aggravating evidence and the minimal nature of the challenged expert evidence in this unique case, the court of appeals erred in concluding that petitioner was not entitled to a certificate of appealability ("COA") because he did not make a substantial showing that the district court abused its discretion in finding that petitioner failed to establish extraordinary circumstances under Rule 60(b)(6) sufficient to reopen a final judgment denying habeas relief to permit him to relitigate a defaulted and meritless ineffective-assistance claim.

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INTRODUCTION

Respondent agrees that "[r]ace is an arbitrary, emotionally charged factor that has nothing to do with individual moral culpability." Pet. Br. 28. Respondent further agrees that the introduction of race into petitioner's capital-punishment proceedings by petitioner's own trial counsel was at least debatably deficient performance, allowing petitioner to establish one element of his application for a COA on his Sixth Amendment claim of ineffective assistance of trial counsel.

But that was not the only showing required to obtain a COA. Petitioner could not obtain a COA without also making a "substantial showing," 28 U.S.C. § 2253(c)(2), on the other half of his ineffective-assistance claim: the prejudice element, requiring a substantial likelihood that the outcome of the capital-punishment proceedings would have been different if petitioner's trial counsel had not presented the expert evidence at issue.

Additionally, petitioner had to show that reasonable jurists would debate whether the district court abused its discretion in finding that petitioner's second Rule 60(b)(6) motion presented no extraordinary circumstances warranting reopening the final judgment denying his habeas petition.

As explained below, petitioner failed to surmount these significant obstacles to obtaining a COA.

STATEMENT

A. Factual Background

1. In July 1995, Kenneth Butler, his brother Harold Ebnezer, family friend Debra Gardner, and Gardner's friend Phyllis Taylor went to Gardner's home in southwest Houston after a night out shooting pool. J.A. 42a, 51a, 75a-76a. At least four children—Taylor's infant, Gardner's adolescent son Devon, Devon's older sister

Shennel, and Devon's cousin Kanetta—were already in the house when the four adults arrived. J.A. 51a-52a, 93a-96a, 109a-111a.

Around 2:30 a.m., when the adults were laughing and joking in the living room, Taylor's stepbrother, petitioner Duane Buck, banged loudly on the front door. J.A. 51a-52a; R.6365-66.[1] Up until two or three weeks earlier, petitioner had been in an unstable romantic relationship with Gardner, and he apparently believed that Butler had been sleeping with Gardner. J.A. 73a-75a, 99a. When Gardner heard that it was petitioner at the door, she called 911 and told the others to go to the back of the house. J.A. 52a-53a.

Petitioner kicked in the front door and entered the house, swearing and yelling. J.A. 53a-55a, 77a. When he approached Gardner and started hitting her, Ebnezer got between them and kept petitioner an arm's length away. J.A. 55a-56a. Petitioner eventually calmed down and told Gardner that he had come to retrieve clothes that he had left at Gardner's house. J.A. 57a-59a, 78a. Gardner gave petitioner his clothes, and he left. J.A. 57a-58a, 77a-78a.

About 45 minutes later, after petitioner had driven back to his father and stepmother's house in northeast Houston, petitioner called the Gardner home and spoke with Taylor. J.A. 78a-79a; R.5716, 5718-19, 5972, 6436-38. Petitioner asked to talk to Gardner. J.A. 79a. When Gardner declined, petitioner hung up. J.A. 79a. Taylor, Gardner, Ebnezer, and Butler talked about what had happened that morning, then went to sleep around 4:30 or 5:00 a.m. in different parts of Gardner's house. J.A. 58a-59a, 80a.

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[1] "R." refers to the record on appeal in the Fifth Circuit.

Back in northeast Houston, petitioner took a shotgun and a rifle from his stepmother's room. R.5714, 6437. Petitioner's teenage brother Clarence watched petitioner load the guns and told petitioner to stop pointing one of them at him. R.6436-38. Petitioner took both guns with him when he set out on the 28-mile drive back to Gardner's house. R.2101, 5716, 5718-19, 5972-74, 6437-38.

2. Around 7:00 a.m., petitioner again banged on Gardner's front door and then kicked it in. J.A. 59a-61a, 80a-81a; R.5859. This time, he had the shotgun and rifle from his stepmother's room with him. J.A. 61a-62a; *see* R.5862-63.

Petitioner fired the shotgun at Ebnezer but missed. J.A. 61a-62a. He then put the shotgun down, armed himself with the rifle, and approached his stepsister Taylor, who was sitting on a couch. J.A. 81a-82a. Petitioner told her: "I'm going to shoot your ass too." J.A. 82a. Taylor responded: "Duane, please don't shoot me. I'm your sister. I don't deserve to be shot. Remember I do have children." J.A. 83a. Petitioner put the gun to Taylor's chest and shot her. Although the bullet did not kill her, it missed her heart by only an inch. J.A. 83a-84a, 90a-91a.

By that time, Ebnezer had run to the back of the house, passing Butler in a hallway and warning him that petitioner had a gun. J.A. 63a-64a. Ebnezer ran into the back yard and found Gardner there, too. J.A. 64a.

Meanwhile, petitioner had moved to the back of the house and shot Butler at close range. J.A. 101a. Petitioner left Butler bleeding in the hallway. J.A. 101a.

Despite having suffered a point-blank shot to her chest, Taylor managed to get up and check on Gardner's son Devon and his cousin Kanetta, who were hid-

ing in a bedroom closet. J.A. 84a-85a, 98a. Taylor shut the closet door, went to the telephone, and called 911. J.A. 85a. But when she heard petitioner's voice, she hung up and got into the closet. R.5867.

In the hallway of Gardner's house, Butler "was throwing up a lot of blood" and trying to talk after petitioner had shot him. J.A. 101a-102a. Devon and Shennel went to Butler and tried to help him. J.A. 101a. Shennel thought that petitioner had shot Butler in the mouth because all she saw was blood coming out of his mouth. J.A. 113a. In fact, petitioner had shot Butler through the heart and a lung. J.A. 120a.

Devon and Shennel went outside to the sidewalk in front of their house. R.6396-97. Devon saw petitioner chasing Ebnezer down the sidewalk. R.6397. Ebnezer ran to a neighbor's house and asked the person who answered the door to call 911. J.A. 67a.

Gardner by then had run out into the street. J.A. 65a. She pleaded with the driver of a passing car to let her in, but the car drove off. J.A. 65a-66a, 103a-104a.

Petitioner approached Gardner in the street from behind. J.A. 66a-67a; R.6398. Devon watched from the sidewalk as his mother stopped in the middle of the street, turned to petitioner, and said: "Please don't shoot me. Please don't shoot me. Why are you doing this in front of my kids?" J.A. 104a; R.6428, 6398-99. Shennel also begged petitioner not to shoot her mother and even jumped on petitioner's back to try to stop him. J.A. 114a, 116a. But petitioner kept the gun pointed directly at Gardner, repeating: "I'm going to shoot you. I'm going to shoot your A[ss]." J.A. 117a.

Petitioner then shot Gardner, perforating her right lung, diaphragm, and liver. J.A. 122a. The bullet's path

was consistent with Gardner being on her knees when she was shot. J.A. 122a.

Petitioner walked back toward the house, retrieved the shotgun that he had left by the front door, and put both the shotgun and rifle into the trunk of his stepmother's car. R.6399. Petitioner then walked back over to Gardner and said: "It ain't funny now. You ain't laughing now." J.A. 106a.

Petitioner walked away from the crime scene after unsuccessfully trying to start his stepmother's car. J.A. 106a-108a. According to Devon, petitioner "was acting like he ain't done nothing." J.A. 108a.

3. Deputy D.R. Warren arrived at the scene and stayed with Gardner, who was lying in a puddle of blood and struggling to breathe. J.A. 130a-131a. Deputy Warren saw three young children near Gardner, including "a little girl who was three or four" and "was running around and crying[,] trying to come over" to where Gardner was lying in the street. J.A. 131a. Gardner told the girl she loved her, and the girl gave Gardner a hug. J.A. 132a.

A second responding officer, Deputy Paul McGinty, noticed a man walking away from where Gardner was lying in the street. J.A. 42a-43a.

McGinty asked a police dispatcher to send paramedics and Life Flight. J.A. 43a-44a. Gardner was at that point "still moving," but she was having difficulty breathing and "not saying anything that [McGinty] could understand other than showing that she was in a good deal of pain." J.A. 44a.

While Deputy McGinty was assisting Gardner, he heard a man yelling "He shot her" and chasing another man towards Deputy McGinty. J.A. 45a-46a. That man was petitioner, whom Deputy McGinty recognized as

the man walking away from the shooting. J.A. 46a. Deputy McGinty took petitioner into custody, placing him in the back of a patrol car. J.A. 46a.

When Deputy McGinty went into the house, he found Butler lying face down in the hallway. J.A. 48a. He also encountered several children who were screaming and crying. J.A. 48a-49a. He took them to a neighbor's house. J.A. 49a.

In the patrol car, petitioner was "laughing and taunting and joking." J.A. 71a; *see* J.A. 89a, 133a-134a. Shennel saw petitioner "in the police car laughing"; petitioner "thought it was funny and it wasn't." J.A. 118a.

On the way to the police station, petitioner continued to smile and laugh. J.A. 134a. When Deputy Warren told petitioner that he did not think the situation was very funny, petitioner stated: "The bitch got what she deserved." J.A. 135a. Petitioner added that God had already forgiven him. J.A. 135a. He remained happy and upbeat as he was taken to the police station. J.A. 135a-136a.

By that time, Butler was dead in the hallway. J.A. 48a. Gardner was dead in the street. J.A. 132a. And Taylor, who survived her stepbrother's point-blank attack, was en route to surgery via Life Flight. J.A. 90a.

B. Judicial Proceedings

1. a. Petitioner was convicted of capital murder. J.A. 276a. At the penalty phase of trial, several lay and expert witnesses testified for the State and for petitioner.

Petitioner's former girlfriend Vivian Jackson testified that petitioner had abused her. J.A. 125a-127a. Jackson explained that, by the end of their relationship, petitioner had begun to hit her almost every day. J.A. 127a. Before then, he had also held a gun to her throat and, in a separate incident, to her face. J.A. 127a. He

had beaten her with a belt, a coat hanger, and a cast on his arm. J.A. 127a. He had threatened to pour boiling water on her. J.A. 127a. Jackson stated that she had been too afraid to call the police about these incidents. J.A. 128a.

The State's other penalty-phase witnesses were Harris County Sheriff's Deputy R.L. Schield, Deputy Warren, and Deputy McGinty. R.933, 977, 987, 991. They testified about petitioner's previous convictions, his upbeat demeanor after the attack, and Gardner's dying moments surrounded by her children. R.955-56 (testimony regarding State's exhibits 62, 63, 67, and 68), 979-81, 992-1001.

Petitioner called several lay witnesses who testified about his behavior before his shooting spree. R.5961-85. He also called two clinical psychologists to help the jury determine "whether there is a probability that [petitioner] would commit criminal acts of violence that would constitute a continuing threat to society." Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, art. 37.071(b)(1), 1991 Tex. Gen. Laws 2898, 2899 ("Former Article 37.071") (current version at Tex. Code Crim. Proc. art. 37.071, § 2(b)(1)); *see* J.A. 138a, 145a. This inquiry is often referred to as the "future dangerousness" issue in capital-punishment proceedings in Texas. *See* J.A. 146a.

One of the psychologists petitioner called was Dr. Patrick Lawrence. R.6068. Lawrence had evaluated hundreds of offenders and had testified for both the prosecution and defense; here, he opined that petitioner was not likely to present future dangerousness. R.6071, 6077, 6094-96.

The other psychologist petitioner called was Dr. Walter Quijano. J.A. 138a. During petitioner's direct

examination of Quijano, defense counsel moved to admit into evidence a copy of the report that Quijano prepared for petitioner's case. J.A. 152a. Over the State's objection, the trial court ruled that it would admit a redacted version of Quijano's report. J.A. 14a-23a, 151a-153a; R.6003-04, 6007-32; *see* R.6127.

Quijano's report first indicated that several "statistical factors," including a capital defendant's past crimes, age, and sex, are predictive of future dangerousness. J.A. 18a (capitalization altered). Quijano's report went on to identify race as another relevant factor for assessing future dangerousness, as follows: "Black: Increased probability. There is an over-representation of Blacks among the violent offenders." J.A. 19a. Petitioner is African-American. J.A. 235a.

Petitioner's counsel elicited Quijano's testimony regarding these factors on direct examination. J.A. 146a. When petitioner's counsel asked about the report's race factor, Quijano stated: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." J.A. 146a. After discussing other purportedly relevant statistical and environmental factors, Quijano testified that petitioner was unlikely to commit criminal acts of violence that would constitute a continuing threat to society. J.A. 146a-150a. Quijano did, however, agree that there was "a probability that [petitioner] would be a continuing threat to society." J.A. 176a. Quijano explained his view that petitioner "would be on the low end of the continuum," adding that he "never rule[s] out any probability." J.A. 176a; *see also* R.6105-06 (admission by Lawrence that there were "no guarantees" that petitioner "will never commit other violent acts").

The prosecutor then cross-examined Quijano at length. She questioned him about his interview and testing of petitioner, his review of eyewitness statements, and several portions of his report. J.A. 155a-176a. During a colloquy reviewing Quijano's report—which the trial court had told counsel would be admitted on petitioner's motion, over the State's objection—the prosecutor asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" J.A. 170a. Consistent with his report, Quijano answered: "Yes." J.A. 170a.

This was the prosecutor's only question on that matter. It appears in the transcript amid several other exchanges canvassing Quijano's report, including ones in which Quijano admitted that numerous factors—including petitioner's history of abuse towards women; his unstable employment record; the extreme violence of his attack on Ebnezer, Taylor, Butler, and Gardner; and the availability of drugs, alcohol, and weapons in prison—increased the probability of future dangerousness. J.A. 168a-175a.

In a further exchange, the prosecutor asked Quijano:

> If you had information that the person thought it was quite humorous, the crime that he committed, which was an extremely violent and heinous act, and even after seeing the result of his handiwork with people bleeding, people screaming, children crying, children running over to their mother and hugging her before she died, would that indicate to you that that person with no re-

morse would have a greater probability of being a danger in the future?

J.A. 175a-176a. Quijano responded: "Yes." J.A. 176a.

b. In closing argument, petitioner's counsel argued that the State had not met its burden to prove that petitioner should be sentenced to death. J.A. 187a-196a. Petitioner's counsel made one brief reference to Quijano, noting Quijano's opinion that petitioner was unlikely to commit an act of violence in prison and arguing that the State had not discredited Quijano. J.A. 192a-193a.

The prosecutor argued that the evidence supported a finding of future dangerousness and, with respect to Quijano, reminded the jurors that they had "heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that [petitioner] would commit future acts of violence." J.A. 197a-199a. This was the only mention of Quijano in the prosecutor's closing statement, and the prosecutor did not remind the jury about Quijano's reference to race.

c. The jury deliberated and returned answers to the penalty-phase questions. *See Ex parte Buck*, 418 S.W.3d 98, 98 (Tex. Crim. App. 2013) (per curiam). In accordance with those answers, the trial court sentenced petitioner to death. *See id.* The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence on direct appeal. *See id.*

2. a. Petitioner's initial state-court application for a writ of habeas corpus did not complain about Quijano's testimony or raise a claim of ineffective assistance of trial counsel. *See* J.A. 277a. While that first application was pending, the State confessed error in *Saldano v. Texas*, 530 U.S. 1212 (2000), a case in which the *prosecution* used Quijano as an expert witness and elicited

race-related testimony from him regarding the defendant's future dangerousness. *See* J.A. 295a-307a.[2] Petitioner subsequently filed a second state-court habeas application in which he challenged Quijano's testimony and asserted ineffective assistance of trial counsel. *See* J.A. 278a. The Texas Court of Criminal Appeals denied petitioner's first application and dismissed the second as an abuse of the writ. *See* J.A. 278a.

b. One year later, petitioner filed a federal habeas petition. *See* J.A. 223a. The petition included a claim that Quijano's reliance on race and the prosecutor's description of Quijano's race-related testimony violated petitioner's Sixth and Fourteenth Amendment rights to an impartial jury, due process, and equal protection. *See* J.A. 235a-236a. It also included a claim of ineffective assistance of trial counsel based on Quijano's testimony. *See* J.A. 236a. The district court denied the petition, finding each of the claims procedurally defaulted and further concluding that petitioner had failed to establish the cause and prejudice he would have needed to excuse the default. J.A. 236a-238a. The district court entered

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[2] On remand from this Court, the Texas Court of Criminal Appeals declined to accept the State's confession of error and reinstated Saldano's sentence. *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002). Saldano subsequently filed a federal habeas corpus petition, which the district court granted because "constitutional error occurred in th[e] case, and because the court decide[d] in its discretion to honor the [State]'s waiver of the affirmative defenses of procedural default and harmless error." *Saldano v. Cockrell*, 267 F Supp. 2d 635, 645 (E.D. Tex. 2003). The Fifth Circuit affirmed the district court's related denial of the district attorney's motion to intervene to argue in support of Saldano's sentence, and it dismissed the district attorney's appeal of the judgment granting habeas relief. *Saldano v. Roach*, 363 F.3d 545, 556 (5th Cir. 2004).

final judgment granting respondent's motion for summary judgment and dismissing petitioner's case with prejudice. R.235. It also declined to issue a COA. J.A. 247a; R.235; *see* 28 U.S.C. § 2253(c)(1).

The court of appeals reached the same conclusions as to procedural default and added that, if it were to consider the merits, it would not issue a COA because petitioner failed to make a substantial showing of the deprivation of a constitutional right. *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (per curiam). This Court denied petitioner's request for a writ of certiorari, and the judgment became final. *Buck v. Thaler*, 130 S. Ct. 2096 (2010) (mem.).

c. Petitioner then moved in district court for relief from the final judgment denying his federal habeas petition, claiming that the State's failure to confess error and waive procedural defenses to petitioner's constitutional claims were extraordinary circumstances justifying relief from the judgment under Rule 60(b)(6) and fraud on the court under Rule 60(d)(3). R.273-90. Petitioner's theory was that the Texas Attorney General had publicly promised not to object to resentencing in his case and five others involving Quijano's testimony that had been referenced in press statements. R.273-90. As the court of appeals noted, however, the record did not reflect that the "Attorney General's statements created legally enforceable rights or later precluded him from distinguishing [petitioner]'s case from the other cases." *Buck v. Thaler*, 452 F App'x 423, 432 (5th Cir. 2011) (per curiam).

The district court denied petitioner's Rule 60 motion and a subsequent motion under Rule 59(e) in which petitioner claimed that the State had made material misrepresentations and omissions in its opposition to his

earlier Rule 60 motion. *See* J.A. 279a. The court of appeals declined to issue a COA and reiterated its earlier conclusion that petitioner's due-process and equal-protection claims would fail on the merits. *See* J.A. 278a-279a; *Buck*, 452 F. App'x at 428, 432-33.

Petitioner again unsuccessfully sought a writ of certiorari. *Buck v. Thaler*, 132 S. Ct. 32 (2011) (mem.). Justice Alito, joined by Justices Scalia and Breyer, issued a statement respecting the denial of certiorari noting the unique facts of this case and distinguishing it from others in which Quijano testified. *Id.* at 32-35 (explaining that petitioner's case was "the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense"). Justice Sotomayor, joined by Justice Kagan, dissented, stating their view that petitioner was entitled to a COA on his constitutional claims based on Quijano's testimony. *Id.* at 35-38.

d. Petitioner then filed a third state habeas application. *See* J.A. 279a. While that application was pending before the Texas Court of Criminal Appeals, this Court held, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), that ineffective assistance of counsel during initial state habeas proceedings in Texas could excuse procedural default of a claim that trial counsel was ineffective. *Id.* at 1921 (extending the reasoning of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)). The Texas Court of Criminal Appeals dismissed petitioner's third habeas application as an abuse of the writ. *See* J.A. 280a. This Court again denied certiorari. *Buck v. Texas*, 134 S. Ct. 2663 (2014) (mem.).

3. a. In federal district court, petitioner then filed a second motion under Rule 60(b)(6) for relief from the final judgment denying his federal habeas petition.

R.1048-1228 (motion and exhibits). The motion focused on petitioner's ineffective-assistance claims regarding his trial counsel's elicitation of race-related evidence from Quijano. R.1067. In the instant case, petitioner wishes to appeal the denial of this motion by obtaining a COA.

The motion asserted that, instead of "s[eeking] funding to retain an expert who did not harbor . . . racially biased, and constitutionally inadmissible, views," petitioner's trial counsel

> [i]ntroduced and relied on Dr. Quijano's testimony and report; they made no effort to ameliorate the harm that inevitably flowed from Dr. Quijano's testimony; they offered no objections; they sought no limiting or curative instruction; and they made no attempt in closing argument to limit, rebut, or contextualize Dr. Quijano's testimony.

R.1067. Petitioner's motion also suggested that the final judgment should be reopened to allow him to argue, under this Court's later decision in *Trevino*, that procedural default should be excused; the motion asserted that state habeas counsel was ineffective in failing to assert that trial counsel was ineffective in both eliciting the Quijano evidence and in failing to challenge "Texas's reliance on" that evidence during the prosecutor's cross-examination of Quijano and in closing arguments. R.1063.

The district court denied the Rule 60(b)(6) motion and declined to issue a COA. J.A. 267a-268a. The court applied precedent of this Court and the Fifth Circuit to hold that a change in decisional law, such as *Trevino*'s extension of *Martinez*, does not alone constitute "extraordinary circumstances" allowing the reopening of a

final judgment. J.A. 260a. The district court reasoned that, although the conduct of petitioner's trial counsel fell below an objective standard of reasonableness, the strong aggravating evidence presented to the jury meant that petitioner could not show that he was prejudiced by his counsel's performance. J.A. 260a-265a (citing *Strickland v. Washington*, 466 U.S. 668 (1984), and concluding that "it cannot be said that there is a reasonable probability that the outcome would have been different if Quijano had made no reference to race").

Petitioner also moved for relief from the district court's judgment under Rule 59(e). *See* J.A. 270a. Noting that "[petitioner]'s argument boils down to mere disagreement with [the court's Rule 60(b)(6)] analysis," the district court denied that motion and again declined to issue a COA. *See* J.A. 272a-273a.

b. Petitioner requested a COA from the court of appeals. *See* J.A. 275a. The court of appeals declined the request, finding that "[j]urists of reason would not debate that petitioner has failed to show extraordinary circumstances justifying relief" under Rule 60(b)(6). J.A. 287a.

In describing the relevant procedural history, the court of appeals noted that, after this Court vacated the judgment in *Saldano* based on the State's confession of error, the Texas Attorney General "publicly identified eight other cases involving racial testimony by Quijano, six of which the [Attorney General] said were similar to Saldano's case; one of those was [petitioner]'s." J.A. 277a. But the court of appeals noted that "[i]t has never been established that the [State] promised not to raise procedural defenses in [petitioner]'s case." J.A. 277a-278a n.1; *see* J.A. 211a-218a (press releases); R.308-09, 1110 (news articles).

In analyzing whether petitioner was entitled to a COA, the court of appeals explained that it was required to deny the application "if [petitioner] fails to establish both (1) that jurists of reason would find debatable 'whether the petition states a valid claim of the denial of a constitutional right' and (2) that those jurists 'would find it debatable whether the district court was correct in its procedural ruling.'" J.A. 281a (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). For purposes of the second part of that analysis, the court of appeals noted that the procedural reason that the district court denied relief was "[petitioner]'s failure to show extraordinary circumstances justifying relief under Rule 60(b)(6)." J.A. 281a.

The court of appeals identified the "eleven facts . . that [petitioner] says make the case extraordinary." J.A. 283a-285a. In rejecting petitioner's argument, the court noted that five of those facts were

> just variations on the merits of [petitioner]'s [ineffective-assistance] claim, which is at least unremarkable as far as [ineffective-assistance] claims go. [Petitioner]'s [ineffective-assistance] claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. Nor are [ineffective-assistance] claims as a class extraordinary under Rule 60(b)(6).

J.A. 285a.

After noting that two of petitioner's other facts "merely point[ed] out that [petitioner]'s [ineffective-assistance] claim was procedurally defaulted and did not get a merits determination," the court of appeals concluded that "[n]o jurists of reason would expand the definition of 'extraordinary' to reach all procedurally

defaulted [ineffective-assistance] claims." J.A. 285a-286a. And the "facts" relating to *Trevino* and *Martinez*, the court of appeals explained, merely pointed to a change in decisional law that was likewise insufficient, in itself, to establish extraordinary circumstances. J.A. 286a.

Finally, the court of appeals addressed petitioner's argument about the State's purported promise not to object to resentencing in light of its confession of error in *Saldano*. J.A. 286a. On this point, the court of appeals reiterated that petitioner had failed to establish any promise by the State in his case. J.A. 286a. But even assuming the State had both made and breached such a promise, the court of appeals stated that

> [t]he broken-promise element to this case makes it odd and factually unusual, but extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances. And they must be extraordinary circumstances 'justifying relief from the judgment.' [Petitioner] has not shown why the alleged reneging would justify relief from the judgment. For example, he has not shown that he relied on the alleged promise to his detriment.

J.A. 286a-287a (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 537 (2005)). The court of appeals went on to explain that "[e]ven assuming arguendo that the other cases at issue are materially similar to [petitioner]'s (which the state disputes), it can hardly be extraordinary that the state chose different litigation strategies between the two cases. Jurists of reason would not debate that [petitioner] has failed to show extraordinary circumstances justifying relief." J.A. 287a.

Petitioner unsuccessfully petitioned for rehearing en banc. J.A. 289a. Judge Dennis, joined by Judge Graves, dissented, stating his view that petitioner had "made the requisite threshold showing of entitlement to relief" necessary to obtain a COA and that the panel had "justif[ied] its denial of a COA based on its adjudication of the actual merits" of petitioner's case. J.A. 290a; *see also* J.A. 292a-294a (recapping petitioner's arguments for relief under Rule 60(b)(6)). This Court granted certiorari. *Buck v. Stephens*, 136 S. Ct. 2409 (2016) (mem.).

All told, petitioner filed 163 pages of briefing in the three Fifth Circuit proceedings (after obtaining leave, in the instant proceeding, to file a reply brief in support of his COA application). *See* Dockets, Nos. 14-70030, 11-70025, 06-70035 (5th Cir.). The State filed 114 pages of responsive briefing. *See id.* And the court of appeals issued three opinions totaling 39 pages. J.A. 275a-287a; R.257-69, 831-47.

SUMMARY OF ARGUMENT

I. The court of appeals did not err in denying petitioner a COA. The court was required to do so unless petitioner made a substantial showing that (A) his ineffective-assistance-of-trial-counsel claim is meritorious and (B) the district court abused its discretion in declining to find exceptional circumstances warranting reopening of its final judgment under Rule 60(b)(6). Petitioner failed to meet his burden on each of those independent points.

A. Petitioner did not make a substantial showing of the actual prejudice required to succeed on a claim of ineffective assistance of counsel. Petitioner did not establish a "substantial" likelihood that the jury would have reached a different conclusion if petitioner's defense counsel had not proffered Quijano's report and

testimony. *Harrington v. Richter*, 562 U.S. 86, 111 (2011). The aggravating evidence of petitioner's future dangerousness—including the horrific facts of the offense, petitioner's callous lack of remorse, and his ex-girlfriend's testimony about petitioner's violence towards her—was overwhelming. And notwithstanding Quijano's opinion that race was probative of future dangerousness, his report and testimony played a limited role at trial. The challenged testimony comprised only a small fraction of Quijano's testimony that petitioner posed a low probability of future dangerousness, the prosecution did not ask the jury to consider petitioner's race, and the mitigation evidence was not nearly as strong as petitioner suggests.

B. Petitioner also did not make a substantial showing that the district court abused its discretion in concluding that petitioner's grounds for reopening the judgment under Rule 60(b)(6) failed to qualify as "extraordinary circumstance[s]." *Gonzalez*, 545 U.S. at 537. A change in decisional law is insufficient, in itself, to establish extraordinary circumstances. And the change in law at issue here—based on *Martinez*, 132 S. Ct. at 1318-19, and *Trevino*, 133 S. Ct. at 1921—does not even apply retroactively to petitioner's claim on collateral review.

But even if this new law did apply retroactively on collateral review, the particular facts of petitioner's case do not rise to the level of extraordinary circumstances justifying reopening the judgment denying the federal habeas petition. Claims of ineffective assistance of trial counsel are routine and do not present extraordinary circumstances justifying reopening a final judgment rejecting such a claim. Moreover, this second attempt to reopen the final judgment under Rule 60(b)(6)

seeks to litigate what is ultimately an unavailing claim of ineffective assistance of trial counsel—a claim that petitioner did not even raise in his first Rule 60(b)(6) motion. Whether the State previously expressed an intent to allow petitioner to litigate that claim notwithstanding procedural default is immaterial because the press statements on which petitioner relies, and the treatment of distinguishable cases involving the *prosecution* eliciting Quijano's race-related testimony, would not justify relief from the judgment.

II. Even though the court of appeals denied petitioner's application for a COA, it did so only after providing petitioner with substantial process. The court of appeals' detailed analysis, and the extensive briefing it permitted, belie petitioner's suggestion that the court ignored the substance of his claim. Nor is the Fifth Circuit's approach to adjudicating COA applications, which regularly includes comprehensive briefing from both sides and occasionally involves oral argument, inconsistent with this Court's instructions.

ARGUMENT

I. The Court of Appeals Correctly Denied Petitioner's Application for a COA.

A petitioner must obtain a COA before he may appeal a "final order in a habeas corpus proceeding." 28 U.S.C. § 2253(c)(1)(A).[3] A COA may not issue unless pe-

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[3] Petitioner has not raised, and has therefore forfeited, any argument that he was not required to obtain a COA to appeal the denial of his Rule 60(b) motion. Regardless, the denial of a Rule 60(b) motion to reopen a judgment denying a federal habeas petition constitutes a "final order in a habeas corpus proceeding," thus requiring a COA to appeal the denial of the order. *See Gonzalez*, 545 U.S. at 535 ("Many Courts of Appeals have construed 28 U.S.C. § 2253 to impose an additional limitation on appellate

titioner "has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To meet this standard, petitioner was required to show that jurists of reason would (A) find it debatable "whether the petition states a valid claim of the denial of a constitutional right" and (B) further "find it debatable whether the district court was correct in its procedural ruling" regarding extraordinary circumstances under Rule 60(b)(6). *Slack*, 529 U.S. at 484; *see, e.g., Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam). As explained below, petitioner failed to make either showing.

A. Petitioner has not made a substantial showing of prejudice, as required to satisfy *Strickland*'s second prong for ineffective-assistance claims.

Petitioner's federal habeas petition alleged that he was denied his constitutional right to effective assistance of trial counsel. R.66. To prevail on such a claim, a petitioner must first show that

> counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion.").

Strickland, 466 U.S. at 687. Petitioner's failure to prove either deficient performance or prejudice will defeat an ineffective-assistance claim, making it unnecessary to examine the other prong. *Id.* at 697.

Under *Strickland*'s first prong, respondent agrees with petitioner that jurists of reason would at least find it debatable whether trial counsel's performance was deficient.[4] That is a necessary, but insufficient, condition to obtain a COA. *See Slack*, 529 U.S. at 483-84.

As petitioner concedes, Pet. Br. 26, 33, the second prong of *Strickland* requires him to make a substantial showing that counsel's actions resulted in actual prejudice—that is, a substantial likelihood of a different result. *Strickland*, 466 U.S. at 690-92.[5] In the capital-

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[4] The district court here found deficient performance. J.A. 263a-264a. In contrast, the Fifth Circuit explained in a previous decision in this case that petitioner "and his counsel presumably made th[e] strategic determination" to elicit Quijano's testimony, "believ[ing] that the potential benefit of Dr. Quijano's ultimate conclusion—that Buck was not likely to pose any future danger to society if incarcerated—outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions." *Buck*, 345 F. App'x at 930. The Fifth Circuit has recognized in another case involving Quijano's race-related testimony that "[t]he decision by counsel to approach the [future dangerousness] question in the relatively oblique and impersonal terms of quantitative presentation" was part of a reasonable defense strategy. *Granados v. Quarterman*, 455 F.3d 529, 535-36 (5th Cir. 2006).

[5] Petitioner does not invoke the structural-error doctrine to argue that he does not have to show prejudice. *See* Pet. Br. 34-39. Thus, respondent does not undertake to address any such argument in contesting petitioner's ineffective-assistance claim, which may be "quantitatively assessed in the context of other evidence presented." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)

sentencing context, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established [had] counsel acted differently." *Richter*, 562 U.S. at 111 (citation omitted). Rather, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Id.* at 112 (emphasis added) (citation omitted). This analysis does not, as petitioner suggests, turn on whether a death sentence was a "foregone conclusion." Pet. Br. 39. "*Strickland* does not require the State to 'rule out' a sentence of life in prison to prevail." *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam).

Reasonable jurists would not debate that petitioner has not shown prejudice under this standard. The aggravating evidence was overwhelming. Quijano's disputed testimony played a very limited role, and Quijano's ultimate conclusion was that petitioner would likely not be a future danger.

1. The aggravating evidence was overwhelming.

Petitioner has abandoned all but one of the grounds of ineffectiveness raised in his most recent Rule 60(b) motion. He now asserts only that his "trial counsel rendered ineffective assistance by knowingly presenting an expert opinion that [he] was more likely to commit future acts of violence because he is Black." Pet. Br. 22; *cf.* R.1067. To sentence petitioner to death, the jury had

to find unanimously that he posed a future danger. *See* Former Article 37.071. The overwhelming aggravating evidence confirms that there was not a "substantial" likelihood that petitioner was prejudiced by his counsel's performance. *Richter*, 562 U.S. at 112.

The penalty-phase evidence established an extensive basis for a finding of future dangerousness. As petitioner admits, the facts of his crimes were "undeniably 'horrific.'" Pet. Br. 39 (quoting the district court's opinion). The jury heard petitioner's own stepsister describe how petitioner shot her point-blank in the chest. J.A. 82a-83a. The jury also heard testimony from multiple witnesses about the murders of Butler and Gardner that followed. J.A. 262a; *see supra* Statement Part A.

That testimony included Gardner's daughter describing how she and her mother begged petitioner not to shoot. J.A. 114a, 116a. The jury heard that these pleas were unpersuasive, as petitioner murdered Gardner in front of her children. J.A. 116a-117a. The penalty-phase evidence also showed that petitioner had a history of domestic violence that included threatening his girlfriend with a gun and repeatedly beating her. J.A. 127a. And the jury heard evidence of petitioner's prior convictions, which included a conviction for unlawfully carrying a weapon. R.955-56 (referencing State's exhibits 63 and 67 (R.6267, 6275)). On this record, it was manifest that petitioner presented a future danger.

Respondent does not argue that the "brutality" of petitioner's crime alone necessarily "preclude[s] a finding of *Strickland* prejudice." Pet. Br. 40.[6] But the bru-

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[6] The cases petitioner cites for the proposition that "a capital prisoner may establish *Strickland* prejudice even when a crime involves appalling facts" have little bearing on this case. *See* Pet. Br. 39-41. Most of those cases involved defense counsel's failure

tality of a crime is highly relevant and probative of future dangerousness and can thus establish a lack of prejudice. *See Belmontes*, 558 U.S. at 27-28 (observing that "[i]t is hard to imagine [that] expert testimony and *additional* facts about [the defendant's] difficult childhood outweigh[ed] the facts of [the victim's] murder," which involved "clearly needless" suffering); *Martinez v. Quarterman*, 270 F App'x 277, 299 (5th Cir. 2008) (objectionable cross-examination "pale[d] in comparison to the other evidence of [defendant's] future dangerousness, especially the brutality of this double homicide"); *Lenz v. Washington*, 444 F.3d 295, 303 (4th Cir. 2006) ("repeatedly stab[bing] a defenseless victim" was "heinous and indicative of future dangerousness"); *Griffith v. Quarterman*, 196 F. App'x 237, 243 (5th Cir. 2006) (per curiam) (noting that the prosecution's case for future dangerousness was "extremely strong," in part be-

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to develop mitigating evidence or an adequate mitigation strategy. *Sears v. Upton*, 561 U.S. 945, 954-56 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 42-43 (2009) (per curiam); *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Walbey v. Quarterman*, 309 F. App'x 795, 801-02 (5th Cir. 2009) (per curiam). Petitioner does not contend that his mitigation evidence was incomplete or superficial. To the contrary, he argues that his trial counsel "presented *substantial evidence* that he was not likely to be violent in prison." Pet. Br. 42 (emphasis added).

Although *Satterwhite v. Texas*, 486 U.S. 249, 259-60 (1988), dealt with improperly admitted expert testimony on future dangerousness, the expert testified for the *State*, which "placed significant weight on [the expert's] powerful and unequivocal testimony" that Satterwhite was a "ten plus" sociopath who was "beyond the reach of psychiatric rehabilitation." Here, the State presented no expert on this issue, whereas defense counsel presented two clinical psychologists who testified that petitioner had a low probability of future dangerousness. J.A. 147a, 148a, 150a; R.6068, 6094-96.

cause the "facts of the crime were horrific and brutal"); *see also United States v. Lujan*, 603 F.3d 850, 854–55 (10th Cir. 2010) (prosecution's evidence of a separate double homicide allegedly committed by the defendant was improperly excluded because it "involved cold, calculated, and brutal conduct," which "has a strong tendency to show Lujan has a propensity for violence and future dangerousness").

And as explained in one of the cases petitioner cites, the "brutal nature" of a crime combined with a "lack of contrition and remorse" is sufficient for a Texas jury to find that a capital defendant presents a continuing threat to society. *Dewberry v. State*, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999) (cited in Pet. Br. 41 n.7). Petitioner thus concedes that his lack of remorse is relevant. Pet. Br. 41 n.7. But he then attempts to disaggregate the evidence, suggesting that neither the "brutality of a capital crime" nor his "lack of remorse" alone supported a finding of future dangerousness. Pet. Br. 39-40, 40, 41 n.7. The jury here, of course, heard evidence of *both* a horrendous crime *and* petitioner's callous lack of remorse. Besides the facts of petitioner's brutal shooting spree just noted, the jury heard testimony that petitioner stood over Gardner as she lay dying in the street and said: "'It ain't funny now. You ain't laughing now." J.A. 106a. The jury also heard that petitioner was laughing about the murders when he was arrested and that he commented to the arresting officer: "The bitch got what she deserved." J.A. 135a.

Petitioner severely downplays the weight of the State's evidence of future dangerousness. *See* Pet. Br. 41-43. Without denying his lack of remorse "in the immediate wake of the crime," petitioner claims that jurors knew that he "had shown remorse after having

time to reflect on his actions." Pet. Br. 41. The prosecution, however, did not rest solely on petitioner's statement to Gardner immediately before she died. *Cf.* Pet. Br. 42 (suggesting that remorseful conduct is rarely present during commission of a crime). The jury also heard several witnesses testify about petitioner's laughter and statements after his arrest. J.A. 71a, 89a, 118a, 133a-135a.

Petitioner also misguidedly relies on two facts: (i) Taylor's post-conviction statement that petitioner had subsequently sought and received her forgiveness and (ii) petitioner's own act of crying during trial testimony. Pet. Br. 41-42 & n.8. Taylor's statement was made *after* the penalty phase of petitioner's trial. For that reason, it plays no role in the *Strickland* analysis and could not call into doubt the outcome of the jury's deliberations. *See Richter*, 562 U.S. at 112. And petitioner's act of crying while witnesses testified against him could be viewed as fear of the consequences of the killings, rather than remorse. *See, e.g.*, *United States v. Santiago-González*, 825 F.3d 41, 50 n.13 (1st Cir. 2016); *Brady v. Pfister*, 711 F.3d 818, 827-28 (7th Cir. 2013); *Nields v. Bradshaw*, 482 F.3d 442, 459-60 (6th Cir. 2007). In this case especially, petitioner's crying at trial pales in force compared to the shocking lack of remorse he demonstrated at the time of the crime and after his arrest.

2. The limited role that Quijano's report and testimony played did not outweigh the overwhelming aggravating evidence.

Petitioner's arguments about Quijano's report and testimony are further weakened by the nature of his claim. Petitioner does not contend, as he intimated in

district court, *see* R.1067, that reasonable trial counsel would have found another expert to testify in place of Quijano.[7] Petitioner thus argues only that trial counsel should not have presented Quijano and should have instead relied only on Lawrence for expert testimony. Pet. Br. 22, 25, 32; *see* R.6068, 6094-96 (Lawrence's testimony that petitioner would not likely be a future danger).

Strickland's prejudice analysis "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Here, Quijano's testimony played a limited role, was elicited by defense counsel, and must be assessed against the overwhelming aggravating evidence.

a. Petitioner's brief focuses on Quijano's testimony that petitioner was more likely to pose a future danger because of his race. But Quijano opined that, if petitioner were sentenced to life in prison, there would be a "low" probability that he would commit criminal acts of violence that would be a continuing threat to society. J.A. 150a.

Quijano further stated that the absence of assaults by petitioner while he was incarcerated was "a good sign that [he] is controllable within a jail or prison setting" and that prisoners serving life sentences "consti-

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[7] An ineffective-assistance claim based on counsel's failure to call a witness must "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Petitioner does not contend that he laid the necessary foundation for such a claim.

tute a good subsection of the prison system," whereas inmates serving shorter sentences "create trouble in the prison system, mischief, fighting." J.A. 150a. Quijano also agreed that there was a "disciplinary system within the prison system that effectively controls inmates." J.A. 151a. And after telling the jury that the "narrower the victim pool, the less dangerous the person will be in the future," Quijano explained his view that petitioner's victim pool in prison was "narrow," as petitioner's "probability of developing a dependent relationship" in prison "would be very small." J.A. 147a, 148a.

Quijano did explain that race was one of seven "statistical factors" he considered in determining likelihood of future dangerousness. J.A. 145a-147a. And Quijano's report listed petitioner's race as one of the seven "statistical factors" he considered. J.A. 18a-19a (capitalization altered). But of the twenty-three lines of the Joint Appendix that comprise his "statistical factor" explanation, Quijano's direct testimony regarding race spans just three lines. J.A. 146a. Quijano's report, which spans ten Joint Appendix pages, J.A. 14a-23a, contains only two lines regarding race, J.A. 19a. And defense counsel concluded his questioning of Quijano about the "statistical factors" by asking whether a defendant such as petitioner, who had no prior violent offenses, would be less likely "to be dangerous or commit acts of violence in the future." J.A. 147a. Quijano agreed that petitioner would be less likely to do so. J.A. 147a.

On cross-examination, the prosecutor mentioned Quijano's race-as-dangerousness testimony only once, when canvassing the various factors contained in Quijano's report, J.A. 170a—which the trial court had already ruled would be admitted into evidence, R.6029-31.

The prosecutor thus did not "compound[] defense counsel's error by eliciting *additional* testimony from Dr. Quijano." Former Prosecutors' Amicus Br. 3 (emphasis added). Nor did the prosecutor's single question in passing "exploit[]" Quijano's statement. Pet. Br. 7. "[T]his colloquy did not go beyond what defense counsel had already elicited on direct examination." *Buck*, 132 S. Ct. at 34 (Alito, J., respecting the denial of certiorari).

Amici suggest that the prosecutor either knowingly relied on the falsity that race was probative of future dangerousness or demonstrated personal racial bias by even mentioning this aspect of Quijano's report. Former Prosecutors' Amicus Br. 10. That suggestion ignores the reality that the prosecutor was merely reviewing the entirety of Quijano's testimony without expressing either agreement or disagreement with Quijano's views. That is sometimes how prosecutors proceed when walking through an expert report to decide whether any particular item deserves a probing question on cross-examination. And after this portion of his testimony, Quijano stuck to his opinion that petitioner's probability of future dangerousness was low. *See* J.A. 176a.

Contrary to petitioner's suggestions, Pet. Br. 8, 18-19, the prosecution did not mention race in its closing arguments. J.A. 184a-186a, 196a-206a. The prosecution noted only that Quijano had testified that the probability of future dangerousness, while low, was still present. J.A. 198a-199a. Quijano's cross-examination had closed on this point, with Quijano acceding to the prosecutor's point that petitioner had a greater probability of being a danger in the future given his laughing and lack of

remorse after his extremely violent murders. J.A. 175a-176a.

b. Given the nature and context of Quijano's testimony, this case is nothing like others involving repeated or direct pleas by the prosecution that the jury consider race or ethnicity as evidence of criminality. *Cf.* Pet. Br. 34-38 (citing *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992) (prosecutor "repeatedly" referred to defendant's ethnicity "as evidence of criminal behavior"); *Reed v. State*, 99 So. 2d 455, 456 (Miss. 1958) (prosecutor told the jury that "'if you don't stop them now, they will next be robbing white people'"); *Allison v. State*, 248 S.W.2d 147, 148 (Tex. Crim. App. 1952) (prosecutor "sought to condemn as a class all testimony coming from members of the colored race" to discredit a defense witness); *Dinklage v. State*, 185 S.W.2d 573, 575 (Tex. Crim. App. 1945) (prosecutor's closing argument referenced defendant's German heritage)).

This case is also distinguishable from ones in which the prosecution made inflammatory race-based statements. *See* Pet. Br. 37-38 (citing *Johnson v. Rose*, 546 F.2d 678, 679 (6th Cir. 1976) (per curiam) (appeal to racial prejudice by a United States Attorney); *United States v. Haynes*, 466 F.2d 1260, 1266-67 (5th Cir. 1972) (prosecutor's use of phrase "[b]urn, baby, burn" as a "racial shibboleth"); *Bryant v. State*, 25 S.W.3d 924, 925 (Tex. App. 2000) (prosecutor's question whether defendant had gotten a "white girl" pregnant); *Cofield v. State*, 82 S.E. 355, 356 (Ga. Ct. App. 1914) (prosecutor's statement that this "was the most horrible case he ever saw in court, a negro going to a white man's yard .. and threatening to kill him"); *Louisiana v. Bessa*, 38 So. 985, 987 (La. 1905) (prosecutor appealed to race for no apparent reason other than to "draw the color line")).

None of these cases involves testimony or reports from a defense expert, let alone from a defense expert who concluded that the defendant presented a low probability of future dangerousness. Petitioner is thus wrong that Quijano's testimony is insurmountably prejudicial under settled law. *See* Pet. Br. 36-38. And petitioner concedes that *defense counsel* elicited Quijano's race-related opinion. *See* Pet. Br. 36.

c. As additional mitigating evidence, petitioner stresses the "substantial evidence that he was not likely to be violent in prison," the prosecutor's purported failure to "dispute any of this evidence," and the fact that jury deliberations took two days. Pet. Br. 42-43. These remaining points likewise do not suggest a substantial likelihood that the sentencing outcome would have been different.

Petitioner overemphasizes the favorability of his expert Lawrence's testimony. Petitioner contends that the jury heard "undisputed testimony from Lawrence that [petitioner]'s prison records showed that he 'did not present any problems in the prison setting'" and that petitioner "had been held in minimum security without incident." Pet. Br. 42 (quoting R.6088). In fact, Lawrence merely observed that petitioner's county and state jail records indicated that petitioner had been held only in minimum security. *See* R.6084, 6087-88. When defense counsel asked what this fact indicated, Lawrence replied that it told him that petitioner "did not present any problems in the prison setting." R.6088. It is at best speculative to extrapolate, from this narrow testimony about petitioner's confinement history, that the jury heard "substantial evidence" that petitioner "was not likely to be violent in prison" while serving a life sentence for murder. Pet. Br. 42.

Petitioner asserts that his violent acts occurred within romantic relationships, arguing that he would not be a future danger because he would not be involved in romantic relationships in prison. Pet. Br. 6-7, 25, 41. But petitioner shot his stepsister at point blank range, and his stepsister was not part of any of petitioner's romantic relationships. Petitioner's assertion that he would not be violent in prison also overlooks testimony confirming that he would likely have illicit access to drugs and alcohol, as well as access to improvised weapons, in prison. J.A. 171a-174a. Even though petitioner committed the murders at issue with a firearm, the availability of makeshift weapons in prison is significant because the jury heard petitioner's ex-girlfriend testify that petitioner had beaten her with a belt and a coat hanger and had even used a cast on his arm to beat her head. J.A. 127a.

Finally, the fact that the jury asked to see "the psychology reports" and "police records" during its deliberations, J.A. 209a, does not suggest that the jury was focused on Quijano's *race-related* testimony or that it was likely to have reached a different conclusion absent Quijano's report and testimony. *Cf.* Pet. Br. 43; Lawyers' Comm. Amicus Br. 30. These additional facts do not come close to establishing a "substantial" likelihood of a different outcome, as required by *Richter*, 562 U.S. at 112. Petitioner therefore did not make a substantial showing of prejudice.

B. Petitioner has not made a substantial showing that the district court abused its discretion in declining to find "extraordinary circumstances" to reopen a final judgment.

Even assuming arguendo that reasonable jurists could debate whether petitioner established prejudice under *Strickland*, the court of appeals correctly denied petitioner's COA application for a separate, independent reason: reasonable jurists could not debate whether the district court abused its discretion in its procedural ruling denying petitioner's second request to reopen the final judgment under Rule 60(b)(6). *Slack*, 529 U.S. at 484.

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case," but only "under a limited set of circumstances." *Gonzalez*, 545 U.S. at 528. Petitioner cannot obtain relief under Rule 60(b)(6) unless "extraordinary circumstances" are present in his case. *Id.* at 535 (citation and quotation marks omitted). And this Court specifically has cautioned that "[s]uch circumstances will rarely occur in the habeas context." *Id.* When evaluating extraordinary circumstances, a "very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)). Review of Rule 60(b) determinations is thus highly deferential. *See id.* (citing *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n.7 (1978)).

Indeed, as petitioner concedes, a district court's resolution of this question "is reviewed under the abuse-of-discretion standard." Pet. Br. 54. And although petitioner notes that "a district court necessarily abuses its discretion when its judgment is based on an error of

law," Pet. Br. 54, he elsewhere concedes that the Rule 60(b) determination in this case required a "fact-intensive inquiry," Pet. Br. 47. Consequently, the "deference that is the hallmark of abuse-of-discretion review" applies with full force in this context. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

To obtain a COA, petitioner had to make a substantial showing not merely that a reasonable appellate judge would find extraordinary circumstances in the first instance, but that the basis for the district court's ruling was so utterly lacking that the district court abused its discretion in failing to reopen the final judgment denying habeas relief. *See Slack*, 529 U.S. at 484; *Leedo Cabinetry v. James Sales & Distrib., Inc.*, 157 F.3d 410, 412 (5th Cir. 1998) ("We will not disturb a district court's decision to deny relief under Rule 60(b) 'unless the denial is so unwarranted as to constitute an abuse of discretion.'" (quoting *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649 (5th Cir. 1988)); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2872, pp. 594-95 n.6 (3d ed. 2012) (collecting cases applying a similarly deferential standard of review to Rule 60(b) rulings).

A survey of cases highlights the truly extraordinary nature of the circumstances that qualify. One court of appeals concluded, for example, that circumstances were sufficiently extraordinary to justify relief from a habeas judgment where a prison guard had affirmatively thwarted an inmate's timely appeal. *Tanner v. Yukins*, 776 F.3d 434, 436-37, 442-44 (6th Cir. 2015). Rule 60(b) relief was also found appropriate where a petitioner with a learning disability relied on another inmate to prepare his appeal, that inmate failed to file a

timely appeal, and the time for an extension had passed. *Davenport v. Tribley*, No. 2:07-cv-14248, 2011 WL 669240, at *3 (E.D. Mich. Feb. 17, 2011). And another district court concluded that circumstances were also sufficiently extraordinary to justify reopening a judgment where petitioner's habeas counsel "effectively abandoned him." *Andrade v. Cate*, No. 2:09-cv-02270, 2013 WL 5375836, at *2 (E.D. Cal. Sept. 24, 2013).

Petitioner did not meet his heavy burden to show extraordinary circumstances. The change in decisional law established in *Martinez* and *Trevino* is insufficient. Moreover, in this second Rule 60(b)(6) motion, petitioner seeks to relitigate an ineffective-assistance claim that he did not even raise in his first Rule 60(b)(6) motion. At base, the particular facts of petitioner's case do not rise to the level of extraordinary circumstances justifying relief from the denial of his federal habeas petition—much less so clearly as to make a contrary judgment an abuse of the district court's broad discretion.

1. The change in decisional law effected by *Martinez* and *Trevino* is insufficient to establish extraordinary circumstances.

As petitioner concedes, the change in law effected by *Martinez* and *Trevino* alone does not qualify as an extraordinary circumstance under Rule 60(b). *See* Pet. Br. 56 ("To be sure, not every case involving a viable *Martinez* claim may justify reopening the judgment under Rule 60(b)."). That follows from *Gonzalez*, in which the Court expressly held that a change in decisional law (there, a new interpretation of the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")) did not constitute extraordinary circumstances under Rule 60(b). *See* 545

U.S. at 536 (stating that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of AEDPA). Thus, *Gonzalez* recognized that whether extraordinary circumstances exist turns on the specific facts "in petitioner's case." 545 U.S. at 537.

Petitioner's concession is in keeping with the decisions of the courts below. As the district court noted, the Fifth Circuit has held that a change in decisional law alone does not amount to extraordinary circumstances. J.A. 260a (citing *Adams v. Thaler*, 679 F.3d 312, 319-20 (5th Cir. 2012) (recognizing that the decisional law change in *Martinez* alone is insufficient to establish extraordinary circumstances)); *see Diaz v. Stephens*, 731 F.3d 370, 375-77 (5th Cir. 2013) (same with regard to *Trevino*).

But petitioner's suggestion that the Fifth Circuit has categorically refused to consider the *Martinez* change in law as a "relevant factor," Pet. Br. 58, is incorrect. In this case, the Fifth Circuit did not reject petitioner's claim of extraordinary circumstances merely on the ground that *Martinez* and *Trevino* were insufficient to overcome the procedural default. It examined all of the particular facts raised by petitioner. *See* J.A. 282a-287a. Likewise, as the Third Circuit has explained, "more than the concededly important change of law wrought by *Martinez* is required—indeed, much more is required." *Cox v. Horn*, 757 F.3d 113, 115 (3d Cir. 2014) (quotation marks omitted); *see also Ramirez v. United States*, 799 F.3d 845, 850-51 (7th Cir. 2015) (agreeing with *Cox* and the Third Circuit's analysis of a Rule 60(b) motion "built upon a postjudgment change in the law," which "takes into account all the particulars of a movant's case" (quoting 757 F.3d at 122)).

There is, however, another reason petitioner cannot rely on *Martinez* and *Trevino* to establish extraordinary circumstances: *Martinez* and *Trevino* do not apply retroactively to cases on collateral review.[8] *See* 28 U.S.C. § 2244(b)(2)(A); *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion). As the Fifth Circuit has correctly explained, this Court has not made either *Martinez* or *Trevino* retroactive to cases on collateral review. *In re Paredes*, 587 F. App'x 805, 813 (5th Cir. 2014) (per curiam). And in the present case, the Court has not granted certiorari on the question whether *Martinez* or *Trevino* apply retroactively.

To the extent a change in decisional law creates a new rule, petitioner must show that this Court has made the rule retroactively applicable to cases on collateral review. *See Teague*, 489 U.S. at 316 (plurality opinion). Under *Teague*, "a new rule can be retroactive to cases on collateral review if, and only if, it falls within one of two narrow exceptions to the general rule of nonretroactivity." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). The first exception is for new substantive rules of criminal law, which "narrow the scope of a criminal statute by interpreting its terms," or "place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citations omitted); *see also Teague*, 489 U.S. at 311 (plurality opinion). The second exception is

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[8] In 2004, when petitioner first raised an ineffective-assistance claim in federal court, procedural default could not be overcome by establishing state habeas counsel's ineffectiveness. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). *Martinez* and *Trevino* later held that ineffective assistance by state habeas counsel could overcome procedural default of a claim of ineffective assistance of trial counsel.

for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (citation and quotation marks omitted).

The rule announced in *Trevino* does not fall within either of the two *Teague* exceptions. *Martinez* and *Trevino* established a new procedural rule, so it cannot be a new substantive rule of criminal law within *Teague*'s first exception. *See* 489 U.S. at 311 (plurality opinion). Nor does this procedural rule qualify as a "bedrock procedural element," *id.* at 315; an "absolute prerequisite to fundamental fairness," *id.* at 314; or a "rule[] requiring 'observance of those procedures that . are implicit in the concept of ordered liberty,'" *Graham*, 506 U.S. at 478 (quoting *Teague*, 489 U.S. at 311 (plurality opinion)). As the Court noted in *Graham*, it is "unlikely that many such components of basic due process have yet to emerge." *Id.* (citation and quotation marks omitted).

The rule announced in *Martinez* and *Trevino* is not a "watershed" rule like that announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). "There is no constitutional right to an attorney in state post-conviction proceedings," so there is no attendant watershed, bedrock right to effective assistance of counsel in those proceedings. *Coleman*, 501 U.S. at 752. *Coleman* "left open" the question "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315. But instead of resolving that question, *Martinez* recognized a "narrow exception" that state habeas counsel's ineffective assistance "may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," *id.*,

and *Trevino* made that rule applicable in capital cases in Texas. 133 S. Ct. at 1917.

That type of "incremental change" does not amount to an "absolute prerequisite to fundamental fairness." *Beard v. Banks*, 542 U.S. 406, 419 (2004) (discussing *Sawyer v. Smith*, 497 U.S. 227, 244 (1990) (quoting *Teague*, 489 U.S. at 314 (plurality opinion)) (quotation marks omitted))). Because petitioner has not shown that he could actually invoke this new, retroactive rule if he were able to reopen the judgment denying his federal habeas petition, the *Martinez* and *Trevino* change in law is "all the less extraordinary in petitioner's case." *Gonzalez*, 545 U.S. at 537.

2. The particular facts of petitioner's case do not establish extraordinary circumstances justifying relief from the judgment.

Petitioner cites several authorities that confirm what *Gonzalez* recognized: whether extraordinary circumstances exist, for purposes of Rule 60(b), turns on the specific facts "in petitioner's case." *Gonzalez*, 545 U.S. at 537; *see* Pet. Br. 46-47. Ultimately, petitioner argues that the "*sui generis* facts of this case (at, and after, trial)—combined with [petitioner]'s diligence and the change in law worked by *Trevino* and *Martinez*—establish the 'extraordinary circumstances' required by Rule 60(b)." Pet. Br. 23. Petitioner bases his argument on the eleven supposed "facts" recited in his Rule 60(b) motion. *See* J.A. 283a-285a. Petitioner faults the district court for considering these circumstances "individually" rather than "holistic[ally]," Pet. Br. 54, but there is no indication that either court below failed to analyze and resolve all of the "facts" together.

As the court of appeals noted, five of those "facts" were "just variations on the merits" of petitioner's ineffective-assistance claim, J.A. 285a, and two "merely point[ed] out that [petitioner]'s [ineffective-assistance] claim was procedurally defaulted and did not get a merits determination." J.A. 285a-286a. Petitioner's remaining "facts" focused on the change in law effected by *Martinez* and *Trevino* and the alleged "broken-promise" in light of the State's confession of error in *Saldano*. J.A. 286a-287a. As the court of appeals concluded, it is beyond reasonable debate that the district court acted within its discretion in declining to find those "facts" extraordinary for purposes of Rule 60(b).

a. As already noted, the overwhelming aggravating evidence in this case foreclosed petitioner's ability to establish the prejudice element of his ineffective-assistance claim. *See supra* Part I.A. A change in decisional law that allows a habeas petitioner to litigate an unavailing ineffective-assistance claim is not an extraordinary circumstance within the meaning of Rule 60(b)(6). *See Ramirez*, 799 F.3d at 851 ("[B]earing in mind the need for the party invoking [Rule 60(b)] to demonstrate why extraordinary circumstances justify relief," courts should consider "whether the underlying claim is one on which relief could be granted."); *Cox*, 757 F.3d at 122.

The fact that petitioner's first Rule 60(b) motion did not even contend that his trial counsel's performance was deficient makes *Martinez* and *Trevino* even less relevant. Petitioner argues that state habeas counsel's failure to assert, in the initial state habeas application, that trial counsel was ineffective is "cause" to overcome procedural default because "trial counsel's error was so egregious that no reasonable post-conviction attorney

could have overlooked it." Pet. Br. 46 (citing *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc)).

But petitioner had new post-conviction counsel when he filed his initial Rule 60(b) motion in federal court, where he argued that a "promise" by the Attorney General allowed reopening the final judgment. R.285-89. Even in that motion, however, petitioner did not claim that his trial counsel's effectiveness was a basis for habeas relief. *See* R.273-90. He raised constitutional claims regarding the *prosecutor*'s questioning of Quijano, but he did not argue that his own trial counsel was deficient in eliciting Quijano's testimony or putting his report into evidence. *See* R.485 (district-court order reflecting that petitioner's motion raised the same due-process and equal-protection claims that the Fifth Circuit had confirmed were procedurally defaulted, *see Buck*, 345 F App'x at 926, 928). Consequently, the change in law effected by *Martinez* and *Trevino* is "all the less extraordinary in petitioner's case[] because of his lack of diligence in pursuing" his ineffective-assistance claim. *Gonzalez*, 545 U.S. at 537; *cf.* Pet. Br. 53-54.

Regardless, under petitioner's theory, state habeas counsel's ineffectiveness, if any, would turn on the existence of trial counsel's ineffectiveness. *Cf. Martinez*, 132 S. Ct. at 1318-19 (petitioner must establish that state habeas counsel "was ineffective under the standards of [*Strickland*]" by showing, among other things, that the underlying claim "should have been raised" by state-habeas counsel). Because petitioner cannot demonstrate the prejudice necessary to support his ineffective-assistance-of-trial-counsel claim, *see supra* Part I.A, state habeas counsel neither performed deficiently nor prejudiced petitioner by failing to raise that

claim, *see Strickland*, 466 U.S. at 694. Petitioner is thus incorrect in stating that state habeas counsel's ineffectiveness is undisputed or would be properly resolved through an evidentiary hearing. Pet. Br. 46 n.10.

b. Petitioner repeatedly asserts that his case is extraordinary because the State purportedly "reneged on its promise" that "it would not oppose [a] new sentencing hearing." Pet. Br. 3; *see* Pet. Br. 12, 14, 19, 20, 22-23, 46, 48, 49, 51, 52-53, 55, 58. But as the court of appeals noted, "[i]t has never been established that the [Attorney General]'s office promised not to raise procedural defenses in [petitioner]'s case." J.A. 277a n.1. In particular, the court "found no statement by the [Attorney General] in the record in which he confessed error relating to [petitioner]'s case and promised not to raise procedural defenses." J.A. 277a n.1.

The court of appeals further explained that, even assuming arguendo that "the [Attorney General] initially indicated to [petitioner] that he would be resentenced," petitioner has never shown "why the alleged reneging would justify relief from judgment." J.A. 286a-287a. Petitioner has no valid response to that point.

Petitioner concedes that any supposed "promise" to waive procedural defenses in federal habeas litigation appeared only in press statements. *See* Pet. Br. 11-12. It is beyond dispute that those statements were made outside of any judicial proceeding, and the State never waived procedural default in a legal proceeding in this case. *See Buck*, 132 S. Ct. at 34 (Alito, J., respecting the denial of certiorari) (noting that "the present case is different from the others in which, as a result of similar testimony by Dr. Quijano, the State did not assert procedural default"); *cf., e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (noting that when "a party as-

sumes a certain position *in a legal proceeding*, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" (emphasis added) (citation and quotation marks omitted)).

Nor does the record in this case "make[] it clear that Texas promised to treat [petitioner]'s case similarly to *Saldano*," Pet. Br. 11-12 n.2, in all respects. The State continues to maintain, as expressed in its response to Saldano's petition for a writ of certiorari, that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice" and that "the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process." J.A. 304a, 305a (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

But as the district court explained in denying petitioner's first Rule 60(b) motion, petitioner "has identified no legal basis for a claim that the Attorney General's statement created legally enforceable rights or that it precluded the Attorney General from later identifying distinguishing facts that made [the General's] initial assessment inapplicable to this case." R.487. That matters because even if circumstances are "odd and factually unusual," J.A. 286a, they cannot support Rule 60(b)(6) relief unless they are "extraordinary circumstances '*justifying relief from the judgment.*'" J.A. 286a (emphasis added) (paraphrasing Fed. R. Civ. P. 60(b) (title)); *see Gonzalez*, 545 U.S. at 535. Because petitioner cannot show that he "relied on the alleged promised to his detriment," petitioner cannot show that the "alleged reneging would justify relief from the judgment." J.A. 287a. Petitioner is thus wrong that the court of ap-

peals' conclusion was mere "*ipse dixit*." Pet. Br. 58. It was a straightforward application of *Gonzalez*, and an evidentiary hearing "about the details of [that] promise," Pet. Br. 12 n.2, would be both improper and unnecessary.

Petitioner's case is significantly different from the five other cases identified as similar to *Saldano* by former Attorney General Cornyn in a press release following *Saldano*. *See* J.A. 215a-217a. "Only in Buck's case did defense counsel elicit the race-related testimony on direct examination." *Buck*, 132 S. Ct. at 34-35 (Alito, J., respecting the denial of certiorari). Regardless of what Attorney General Cornyn said in a press statement in 2000, *see* Pet. Br. 11 (citing J.A. 213a, 215a-217a), petitioner's case was pending in state court at the time, and was therefore being handled by the Harris County District Attorney—rather than the Texas Attorney General, who represents the state-official respondents in federal habeas proceedings (and the State in state habeas proceedings if requested by a county district attorney). *See* Tex. Code Crim. Proc. art. 2.01; Tex. Gov't Code § 402.028; Pet. Br. 12.

The Attorney General's Office took over petitioner's case when it reached federal court and correctly argued that it was notably different from *Saldano*, *Gonzales*, *Broxton*, *Garcia*, *Alba*, and *Blue*.[9] In *Saldano*, *Gonzales*, *Broxton*, and *Garcia*, "the prosecution called Dr. Quijano and elicited the objectionable testimony on di-

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[9] *See Saldano*, 530 U.S. 1212; *Gonzales v. Cockrell*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002); *Broxton v. Johnson*, No. 4:00-cv-01034 (S.D. Tex. Mar. 28, 2001); *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sept. 7, 2000); *Alba v. Johnson*, 232 F.3d 208 (5th Cir. 2000) (table) (per curiam); *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sept. 29, 2000).

rect examination." *Buck*, 132 S. Ct. at 34 (Alito, J., respecting the denial of certiorari). In *Alba* and *Blue*, "while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross-examination." *Id.* Thus, as three Justices of this Court have recognized, among these cases, petitioner's "is the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense." *Id.* at 35.[10]

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[10] In responding to petitioner's federal habeas petition, the State initially did erroneously distinguish petitioner's case from *Saldano* and the other cases in which the State confessed error on the grounds that "Dr. Quijano testified for the State" in those cases. R.155 (emphasis omitted). In actuality (and as just noted), "the defendants in both *Blue* and *Alba* called Quijano to the stand." *Buck*, 132 S. Ct. at 37 (Sotomayor, J., dissenting from the denial of certiorari). Petitioner focused on this misstatement in his first Rule 60(b) motion. *See* R.273-89 (petitioner's September 7, 2011 Rule 60(b) motion). In the State's response to that motion, which was filed two days later in the course of accelerated briefing shortly before petitioner's scheduled execution, *see* R.429-32, the State again misidentified *Alba* as a case in which the prosecution had called Quijano, and it did not address *Blue*, R.464; *see Buck*, 132 S. Ct. at 37 (Sotomayor, J. dissenting from the denial of certiorari). Petitioner raised this second mistake in his motion for Rule 59(e) relief. *See* R.493-512.

On appeal, the State corrected its errors, noting that "although the defendants in [*Alba*] and [*Blue*] each proffered Quijano as a witness, they did not, like [petitioner], elicit race-related testimony on direct examination; instead, the prosecution first did so on cross-examination." *Buck*, 132 S. Ct. at 37 (Sotomayor, J. dissenting from the denial of certiorari); *e.g.*, *Buck v. Thaler*, No. 11-70025, Doc. 00511602284 at 40 (5th Cir. Sept. 14, 2011) (State's opposition to petitioner's COA application acknowledging the State's previous error but explaining that "[r]egardless of who *sponsored* Quijano's testimony, the real concern is *who proffered the race-based opinion*," and that

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In sum, petitioner's request for a COA was not "supported by any evidence demonstrating" an entitlement to relief. *Miller-El*, 537 U.S. at 340. For that reason, no reasonable jurist could conclude that the district court abused its discretion in denying petitioner's second Rule 60(b)(6) motion.

II. Petitioner Received Substantial Process.

A. Petitioner argues that the court of appeals "fail[ed] to 'give full consideration to the substantial evidence' of extraordinariness presented" by petitioner. Pet. Br. 57 (quoting *Miller-El*, 537 U.S. at 341). That is not a fair characterization of the process petitioner received. Even though the court of appeals ultimately denied petitioner's request for a COA, it did so only after years of litigation, involving significant process, regarding Quijano's race-related testimony at the penalty phase of petitioner's trial.

Respondent does not dispute that this case presents "odd and factually unusual" circumstances. J.A. 286a. The question for the court of appeals was whether, under existing law, reasonable jurists could debate whether the district court abused its discretion in determining that no extraordinary circumstances existed to reopen the judgment under Rule 60(b). Existing law included this Court's admonition in *Gonzalez* that Rule 60(b) extraordinary circumstances "will rarely occur in the habeas context," 545 U.S. at 535, and a limited pool of precedent finding extraordinary circumstances in that context. *See* J.A. 282a, 285a (relying on this statement

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"the court below was hardly unaware of *Blue* and *Alba* as both were cited in Buck's [Rule 60(b)] motion").

from *Gonzalez* and noting that "[t]here is little guidance as to what constitutes 'extraordinary circumstances'" in habeas cases).

In considering how the case should be resolved in light of existing precedent, the court of appeals did not "ignore" the race-related testimony underpinning petitioner's arguments. Pet. Br. 57. The court quoted Quijano's race-related testimony, acknowledged that his testimony tracked his report, quoted the prosecutor's cross-examination of Quijano regarding his opinion about race, and noted what the prosecutor said regarding Quijano in her closing statement. J.A. 276a. The court of appeals also referenced its previous explanation of how it would decide the merits of petitioner's due-process and equal-protection claims, which were based on the prosecution's reference to Quijano's race-related testimony. J.A. 278a (citing *Buck*, 345 F. App'x at 930). And it cited the opinions from Justices of this Court regarding the denial of petitioner's earlier certiorari petition, which likewise analyzed the race-related evidence presented at the penalty phase of petitioner's trial. J.A. 278a-279a.

The court of appeals went on to quote the "eleven facts," most of which focused on Quijano's race-related evidence, "that [petitioner] says make the case extraordinary." J.A. 283a-285a. The court also granted petitioner leave to file a reply brief to supplement the argument that he had already presented in his 70-page opening brief. *See* J.A. 3a. And in deciding whether a COA should issue, the court of appeals did not deny relief in a summary order without analyzing petitioner's ineffective-assistance claim. It addressed each of the points that petitioner raised, explaining why they did not warrant the extraordinary remedy of Rule 60(b) re-

lief and why reasonable jurists could not debate that point under existing law. J.A. 285a-287a.

In his dissent from the denial of rehearing en banc, Judge Dennis faulted the panel for "adjudicati[ng] . . . the actual merits" of petitioner's claim. J.A. 290a. But even the COA-stage review that Judge Dennis indicated was appropriate would address the merits to some degree, and a court of appeals should not be faulted for erring on the side of more process, rather than less. Accordingly, even if this Court were to conclude that a COA should have been granted, the court of appeals' analysis and the extensive briefing it permitted belies the assertion that the substance of petitioner's claim was ignored—particularly in light of the lengthy procedural history of the case. *See* J.A. 275a; *see also* Criminal Defense Lawyers' Amicus Br. 3-4 (recognizing that the court of appeals "conduct[ed] a detailed analysis of the merits" of petitioner's claim).

B. Citing charts reflecting dispositions of COA applications in the Fourth, Fifth, and Eleventh Circuits, petitioner argues that the Fifth Circuit's approach is, more generally, inconsistent with this Court's precedents. Pet. Br. 57 (citing Pet. Br. App.). But the Court has advised that it is not appropriate to grant a COA in every capital habeas case, explaining that "issuance of a COA must not be *pro forma* or a matter of course." *Miller-El*, 537 U.S. at 337. Rather, the COA must serve a "gatekeeping function." *Gonzalez v. Thaler*, 132 S. Ct. 641, 650 (2012). In light of that guidance, it is quite questionable whether a zero-percent capital COA denial rate in the Fourth Circuit, *see* Pet. Br. 57, serves a gatekeeping function—let alone whether such a practice is more consistent with this Court's precedents than the

Fifth Circuit's practice of denying some capital COA applications after providing extensive process.[11]

In fact, the Fifth Circuit occasionally hears oral argument when considering whether to grant a COA in a capital case. For example, in *Allen v. Stephens*, 805 F.3d 617 (5th Cir. 2015) (No. 14-70017) (cited in Pet. Br. App. 5a), the parties filed over 100 pages of opening briefing, the petitioner was granted leave to file a reply brief, and a Fifth Circuit panel heard oral argument before denying the request for a COA.[12] The court followed a similar pattern in *Trottie v. Stephens*, 720 F.3d 231 (5th Cir. 2013) (No. 11-70028) (cited in Pet. Br. App. 17a).[13] And in *Sells v. Stephens*, 536 F. App'x 483 (5th Cir. 2013) (No. 12-70028) (cited in Pet. Br. App. 15a), the court received nearly 200 pages of initial briefing,

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[11] The Fifth Circuit also has, in a number of cases, denied habeas relief after granting a COA. *E.g.*, *Gates v. Davis*, No. 15-70024, 2016 WL 2909193 (5th Cir. May 18, 2016) (per curiam) (COA grant); *Gates v. Davis*, No. 15-70024 (5th Cir. Aug. 24, 2016) (affirming denial of relief); *Villanueva v. Stephens*, 555 F App'x 300 (5th Cir. 2014) (COA grant) (per curiam); *Villanueva v. Stephens*, 619 F App'x 269 (5th Cir. 2015) (per curiam) (affirming denial of relief); *Wood v. Stephens*, 540 F App'x 422 (5th Cir. 2013) (per curiam) (COA grant); *Wood v. Stephens*, 619 F App'x 304 (5th Cir. 2015) (per curiam) (affirming denial of relief); *Maldonado v. Thaler*, 389 F. App'x 399 (5th Cir. 2010) (per curiam) (COA grant); *Maldonado v. Thaler*, 625 F.3d 229 (5th Cir. 2010) (affirming denial of relief).

[12] *See* Doc. 00512725761 (5th Cir. Aug. 7, 2014) (COA application); Doc. 00512823602 (5th Cir. Nov. 3, 2014) (response); Doc. 00512890244 (5th Cir. Jan. 6, 2015) (order granting leave to file reply); Doc. 00512890250 (5th Cir. Jan. 6, 2015) (reply).

[13] *See* Doc. 00511881267 (5th Cir. May 31, 2012) (COA application); Doc. 00511950674 (5th Cir. Aug. 8, 2012) (response); Doc. 00511957466 (5th Cir. Aug. 15, 2012) (order granting leave to file reply); Doc. 00511976208 (5th Cir. Sept. 5, 2012) (reply).

permitted a reply brief, considered the parties' supplemental authorities, invited supplemental letter briefs from both sides, and heard oral argument before denying the request for a COA.[14] The Fifth Circuit's practice thus provides substantial process to capital COA applicants.

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[14] *See* Doc. 00512104116 (5th Cir. Dec. 26, 2012) (COA application); Doc. 00512176140 (5th Cir. Mar. 15, 2013) (response); Doc. 00512204732 (5th Cir. Apr. 10, 2013) (order granting leave to file reply); Doc. 00512204788 (5th Cir. Apr. 10, 2013) (reply); Doc. 00512258974 (5th Cir. May 31, 2013) (petitioner's Federal Rule of Appellate Procedure 28(j) letter); Doc. 00512259688 (5th Cir. June 3, 2013) (respondent's Federal Rule of Appellate Procedure 28(j) letter); Doc. 00512270847 (5th Cir. June 12, 2013) (order granting leave to file supplemental letter brief); Doc. 0512284137 (5th Cir. June 22, 2013) (petitioner's letter brief); Doc. 00512288899 (5th Cir. June 26, 2013) (respondent's letter brief).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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